IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947

No. 278

ROGER TOUHY,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR REHEARING

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PREFATORY NOTE.

Under the present rules an application for rehearing after the Court has denied a petition for certiorari, seems somewhat anomalous. A petition for certiorari for the review of a specific judgment, is usually prepared with meticulous care. It is accompanied by a transcript of the pleadings, evidence, orders and judgment. It also presents in detail the history of important, complicated facts and court decisions and the controversies of law and fact which have arisen.

If the order of court merely denies certiorari, that order conveys to counsel no information of how the various controversies of law and fact were decided. Counsel cannot in such a situation point out error, points "overlooked", or contentions "misapprehended".

But the recent amendment to Rule 33 of this Court casts light on the view of this court as to what is considered to be the scope and purpose of a petition for rehearing when it is sought in the circumstances above portrayed.

After January 1, 1948 counsel may apply for a rehearing on ". . . substantial grounds available to petitioner *although not previously presented* . . .". What the Court has considered to be a good rule after January 1, 1948, ought not to be an unreasonable interpretation of the present rule in the shadowland domain of the present rule.

The petition for a writ of certiorari in this case was denied on October 20, 1947.

Now comes Roger Touhy, petitioner, by Edgar B. Tolman, Thomas I. Megan and Howard B. Bryant, his attorneys, and respectfully asks the Court for a rehearing of his petition for a writ of certiorari to the Supreme Court of Illinois to review the judgment of that court in the error *coram nobis* proceedings more fully described in the record and petition for certiorari, on file in the above entitled case.

I.

We raised the question as to whether or not the introduction of perjured testimony on the trial of the original indictment by a jury did not of itself vitiate the judgment of conviction. In addition to what was said on that point on pages 40-42 of our petition and brief in this case we desire to emphasize that point by reference to the pro-

position of law that where, by a petition for certiorari, unlawful imprisonment is shown by the introduction of perjured testimony, petitioner does not have to prove his innocence. All that is required in such a situation is that he show the probability that the perjured testimony vitiated the verdict and judgment.

Hawk v. *Olson,* 326 U.S. 271, 278-279.
See also *Pyle* v. *Kansas,* 317 U.S. 213, 215-216.
Smith v. *O'Grady,* 312 U.S. 329, 334.

In the case at bar the perjury is of such a character as to vitiate the verdict and judgment. The Attorney General on page 4 of his brief states that "The petition for writ of error *coram nobis* in the criminal court says that in October, 1934, 'Factor told Thomas C. McConnell, a Chicago lawyer, that he (Factor) had not been able to see anyone during the holding for ransom, on account of a bandage over his eyes, but that he swore to the identification of Touhy anyway' ", which means that Factor identified Touhy without any knowledge whatever. The Attorney General at pages 4 and 12 admits that this evidence was "vital if true". This indicates that there was "strong probability" that perjury had affected the verdict, and meets the requirement of the law in a situation such as this.

II.

On pages 42-44 of our petition for certiorari we pointed out that *Woods* v. *Nierstheimer,* 328 U.S., 211, was controlling in the case at bar. Perhaps in our effort to restate our contentions without obscuring the point in a multitude of words our point may have been over-simplified. An examination of the *Nierstheimer* case shows the exhaustion of all state remedies except resort to the remedy of error *coram nobis.* In this case also the record shows the exhaustion of all other remedies under Illinois

law and by this error *coram nobis* proceeding we sought to exhaust all remedies available under the state law. This we certainly have done unless this petition for rehearing is to be classed as a necessary step in the exhaustion of state remedies.

III.

There is another aspect of the *Nierstheimer* case, fully worked out in Mr. Charles P. Megan's "Suggestions in Support" (R. 18-19), namely that under the Illinois Constitution the statute abolishing the remedy of error *coram nobis* and substituting a simpler method for that remedy has at all times been considered a part of the *Civil* Practice Act; that when the legislature saw fit to adopt amendments to the Criminal Code, a different form of title to the act was required to be used making clear the intent that it should be considered as an amendment to the *Criminal* Code.

People v. *Murphy,* 296 Ill. 532.

Given a situation where the form of an amendment is susceptible of being interpretated as amending both the Civil Practice Act and the Criminal Code, we should have made the point that the statute so interpreted runs counter to the provision of the Constitution of Illinois, that an Act should deal with but one subject and that that single subject should be expressed in the title. True it is that the effect of the Constitution of Illinois on Illinois statutes presents a question of state law, but it does not present a statute available as a *remedy* to one unlawfully deprived of his liberty. The statute is one relied upon by the State to take away a remedy. In such circumstances is not the Court justified in wholly disregarding an unconstitutional statute which has deprived the petitioner of his rights under the due process clause of the Constitution?

IV.

In an endeavor to allocate and simplify the issues, in assigning the grounds for Federal jurisdiction, we formerly assigned only the grounds of denial by the state court of the right of petitioner to protection against the deprivation of his rights under the Federal Constitution to due process of law. That ground seemed so sufficient that no specification of conflict of decision or of the discretionary character of the court's treatment of this application was set out, although it was clearly deducible from the record and the petition.

May we now be permitted to assign as additional grounds for certiorari the fact that there is conflict of decision between the judgment of the Illinois Supreme Court and the decision in the *Nierstheimer* case.

Rule 38 (5a) indicates that this court will exercise its discretionary power to grant certiorari where a state court has decided a federal question of substance not heretofore determined by this Court or has decided it in a way probably not in accord with applicable decisions of this Court.

Since we did not specifically mention this rule in our briefs we feel it our duty to refer to it now. In the light of this rule and the importance of the questions involved, we ask the Court to exercise its discretionary power and grant a rehearing.

All of which is respectfully submitted.

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November 12, 1947

CERTIFICATE OF COUNSEL.

Edgar B. Tolman one of the counsel for Roger Touhy, petitioner herein, hereby certifies that this application for a rehearing is made in good faith and not for delay.

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EDGAR B. TOLMAN.